

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 756

THE UNITED STATES OF AMERICA, PLAINTIFF IN
ERROR

vs.

THE P. KOENIG COAL COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MICHIGAN

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I



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In the United States District Court

Indictment. Summary of charges

COUNT ONE

Accepting concession in respect to the transportation of coal in car "C. & O. 60260," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Samaritan Hospital, and diverted to Dodge Brothers.

COUNT TWO

Accepting concession in respect to the transportation of coal in car "C. & O. 15284," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of Samaritan Hospital, and diverted to Fisher Body Corporation.

COUNT THREE

Accepting concession in respect to the transportation of coal in car "C. & O. 61527," from Yuma Mine, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Samaritan Hospital, and diverted to Dodge Brothers.

COUNT FOUR

Accepting concession in respect to the transportation of coal in car "C. & O. 33198," from Yuma Mine, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of Providence Hospital, and diverted to Dodge Brothers.

COUNT FIVE

Accepting concession in respect to the transportation of coal in car "S. T. T. X. 1197," from Yuma Mine at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT SIX

Accepting concession in respect to the transportation of coal in car "C. & O. 37907," from Yuma Mine, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit, September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Fisher Body Corporation.

COUNT SEVEN

Accepting concession in respect to the transportation of coal in car "C. & O. 62788," from Monitor Mine No. 1, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 30, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT EIGHT

Accepting concession in respect to the transportation of coal in car "C. & O. 13105," from Monitor Mine No. 2, at Logan, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 31, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT NINE

Accepting concession in respect to the transportation of coal in car "N. Y. C. 314045," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.-C. C. C. & St. L.-D. & T. S. L.-G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT TEN

Accepting concession in respect to the transportation of coal in car "C. & O. 62739," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.-C. C. C. & St. L.-D. & T. S. L.-G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT ELEVEN

Accepting concession in respect to the transportation of coal in car "C. & O. 58292," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.-C. C. C. & St. L.-D. & T. S. L.-G. T. railroads, arriving at Detroit September 6, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT TWELVE

Accepting concession in respect to the transportation of coal in car "C. & O. 62977," from Lundale Mine, at Lundale, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT THIRTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 54948," from Lundale Mine, at Lundale, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT FOURTEEN

Accepting concession in respect to the transportation of coal in car "C. C. C. & St. L. 81349," from Dabney Mine, at Dabney, W. Va., by C. & O.-C. C. C. & St. L.-D. & T. S. L.-G. T. railroads, arriving at Detroit September 1, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

3

COUNT FIFTEEN

Accepting concession in respect to the transportation of coal in car "C. C. C. & St. L. 73494," from Dabney Mine, at Dabney, W. Va., by C. & O.-C. C. C. & St. L.-D. & T. S. L.-G. T. railroads, arriving at Detroit September 1, 1922, consigned in name of St. Mary's Hospital, and diverted to Dodge Brothers.

COUNT SIXTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 63900," from Lundale Mine, at Lundale, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit August 30, 1922, consigned in name of Detroit Creamery, and diverted to Dodge Brothers.

COUNT SEVENTEEN

Accepting concession in respect to the transportation of coal in car "Erie 31280," from Lundale Mine, at Lundale, W. Va., by C. & O.-D. T. & I.-Wabash-G. T. railroads, arriving at Detroit September 2, 1922, consigned in name of Detroit Creamery, and diverted to Dodge Brothers.

COUNT EIGHTEEN

Accepting concession in respect to the transportation of coal in car "C. & O. 19447," from Argyle Mine No. 1, at Yolyn, W. Va., by C. & O.-C. C. C. & St. L.-M. C. R. R.-G. T. railroads, arriving at Detroit August 28, 1922, consigned in name of Towars Creamery, diverted to Fisher Body Corporation.

4

Violation of Act of Congress, approved February 19, 1903, as amended, (Elkins Act, 32 Stat. at L. 847, 34 Stat. at L. 584).

In United States District Court for the Eastern District of Michigan, Southern Division

Indictment

Filed November 22, 1923

FIRST COUNT

EASTERN DISTRICT OF MICHIGAN,
Southern Division, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Southern Division of the Eastern District of Michigan at the November term of said court in the year 1923, and inquiring for said division and district, upon their oath present,

1. That the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all
5 of the rules, regulations and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that, in and by said Service Order No. 23, is was provided that each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that, in supplying cars to mines upon the lines of any such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specially designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No.

23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of hospitals should not be reconsigned or diverted for such manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said section of the United States, to wit, of the Chesapeake and Ohio Railway Company, resulting from strikes and nonaction of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and, although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the current use of hospitals, and for the current use of other consumers of coal in the same class with hospitals, to wit, class 2, under said Service Order No. 23, to wit, seventy-eighth per cent. thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatever for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, under the circumstances and conditions hereinabove set forth and described, during said period of time, to wit, on August 31, 1922, the P. Koenig Coal Company, a corporation under the laws of the State of Michigan, engaged, at the city of Detroit, in said Southern Division of said Eastern District of Michigan, in the business of a coal dealer, then and before then well knowing all the premises aforesaid, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from the Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order

No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

8 The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereinafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on that day, from Detroit aforesaid, to the Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order for coal which purported to be an order for the shipment of five carloads of coal to the Samaritan Hospital, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said The Grand Trunk Railway Company of Canada, for the use of said Samaritan Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its lines in West

9 Virginia, to wit, the railroad car bearing the initials "C. & O." and the serial number "60260," at Monitor No. 2 mine of said The Monitor Coal and Coke Company, at Logan, in West Virginia aforesaid, the loading of said car, on August 5, 1922, by said The Monitor Coal and Coke Company, with 96,700 pounds of run-of-mine bituminous coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company, upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for

securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was
10 so used by said concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer whatever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company,
and which the said common carriers, but for said device and
11 deception, would not have granted to it, and, whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

12

SECOND COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were here repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive

a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such

13 coal dealers there and all shippers desirous of shipping coal embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railroad Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereinafter named the transportation of the coal in this count mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on the day in said first count in that behalf aforesaid, from Detroit aforesaid, to said The Monitor Coal and Coke Company, the telegraphic order in said first count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "15284," at said

14 Monitor No. 2 mine of said The Monitor Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 5, 1922, by said The Monitor Coal and Coke Company, with 78,600 pounds of run-of-mine bituminous coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street: which said delivery said The P. Koenig Coal Company then and there accepted; and

which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the

15 Fisher Body Corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said The Fisher Body Corporation, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in the count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The

16 P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

17

THIRD COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern

Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were here repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against

all other such coal dealers there and all shippers desirous of
18 shipping coal embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count mentioned, in interstate commerce from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on the day in said first count in that behalf aforesaid, from Detroit aforesaid, to said The Monitor Coal and Coke Company, the telegraphic order in said first count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said The Monitor Coal and Coke Company, and of the Yuma Coal and Coke Company, of a certain

other car, suitable for the loading and transportation of coal,
19 at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "61527," at the Yuma mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 7, 1922, by said Yuma Coal and Coke Company, with 99,700 pounds of run-of-mine bituminous coal, the tendering, by said Yuma Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common car-

riers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its Grand Trunk siding near Scott Street: which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to said Dodge Brothers, for its use *use* in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Samaritan Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oaths aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the first count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said first count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and

a discrimination was practiced in its favor and against all other such coal dealers there and all shippers desirous of shipping coal embraced in said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count mentioned, in interstate commerce from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern as hereinafter shown, by and through the device of sending, on said August 2, 1922, from Detroit aforesaid, to said The Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order which purported to be an order for the shipment of ten carloads of coal to the Providence Hospital, in said City of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said

The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said The Grand Trunk Railway Company of Canada, for the use of said Providence Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Rail-

way Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company, and of said Yuma Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at a certain coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "33198," at the Yuma Mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 5, 1922, by said Yuma Coal and Coke Company, with 104,500 pounds of run-of-mine bituminous coal, the tendering, by said Yuma Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street: which said delivery said The P. 25 Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, the Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Providence Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

26 3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in

interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

27

FIFTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations, and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that in and by said Service Order No. 23, it was provided that each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among

28 which was coal, and that, in supplying cars to mines upon the lines of any such carrier as was a coal-loading carrier, that is to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specifically designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of hospitals, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manu-

facturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No. 23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of hospitals should not be re-consigned or diverted for such manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and its said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the

lines of a certain coal-loading railroad common carrier in said section of the United States, to wit, of the Chesapeake and Ohio Railway Company, resulting from strikes and non-action of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the current use of hospitals and for the current use of other consumers of coal in the same class with hospitals, to wit, class 2, under said Service Order No. 23, to wit, seventy-eight per cent thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatever for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that, under the circumstances and conditions hereinabove set forth and described, during said period of time, to wit, on August 31, 1922, said The P. Koenig Coal Company, a corporation under the laws of the State of Michigan, engaged at the city of Detroit, in said Southern Division of said Eastern District of Michigan, in the business of a coal dealer, then and before then well knowing all the premises in this count of this indictment aforesaid, at said city of Detroit, in said Southern Division of said Eastern District of Michigan, unlawfully did knowingly accept and receive a certain concession in respect to the transportation of certain property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from the Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company and the Grand Trunk Railway Company of Canada, whereby an advantage

was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced within said classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal which it was not then lawfully entitled to receive, and

31 intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, and to divert and deliver the same to said concern, by and through the device of sending on that day from Detroit aforesaid to the Monitor Coal and Coke Company, at Huntington, West Virginia, a telegraphic order for coal which purported to be an order for the shipment of ten carloads of coal to the St. Mary's Hospital at said city of Detroit, in said Southern Division of said Eastern District of Michigan, in care of said The P. Koenig Coal Company, and to be delivered there to said The P. Koenig Coal Company upon its side track connecting with the line of said Grand Trunk Railway Company of Canada, for the use of said St. Mary's Hospital, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said The Monitor Coal and Coke Company and of said Yuma Coal and Coke Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its lines in West Virginia, to wit, the railroad car bearing the initials "S. T. T. X.," and the serial number "1197," at the Yuma mine of said Yuma Coal and Coke Company, at Logan aforesaid, in West Virginia aforesaid, the loading of said car, on August 5, 1922, by said Yuma Coal and Coke Company, with 96,500 pounds of run-of-mine bituminous coal, the tendering, by said Yuma

32 Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof from Logan aforesaid, by said common carriers by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company, upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said concern; and that at the several times of the sending by said The P. Koenig Coal Company of said last-mentioned telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig

Coal Company and of its said diversion and delivery to said 33 concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer whatever.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

34

SIXTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were

herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Iron-ton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

35 The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid, well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said The Monitor Coal and Coke Company and of the Yuma Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at said coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "37907," at said Yuma mine of said Yuma Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 7, 1922, by said Yuma Coal and Coke Company, with 113,900 pounds of run-of-mine bituminous coal, the tendering, by said

Yuma Coal and Coke Company to said The Chesapeake and
36 Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then

and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the Fisher Body Corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to

and acceptance by said The P. Koenig Coal Company, and of
37 its said diversion and delivery to said concern, the said St.

Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said The Fisher Body Corporation, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

38

SEVENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on August 30, 1922, at Detroit aforesaid, in said Southern Divi-

sion of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this court by reference as fully as if they were hereby repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company that is to say:

39 The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia, into said Southern Division of said Eastern District of Michigan, for the use of the concern in the manufacture of automobiles and automobile parts by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 10, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car suitable for the loading and transportation of coal, at said coal loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "62788," at said Monitor mine No. 1 of said The Monitor Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 10, 1922, by said The Monitor Coal and Coke Company with 103,600 pounds of run-of-mine bituminous coal, the tendering by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, i

accordance with said billing, and its delivery there, on said August 30, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig

Coal Company, and of its said diversion and delivery to said
41 concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during the period of time in the fifth count of this indictment mentioned, to wit, on August 31, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions described in paragraph numbered 1 in said fifth count, the allegations of which said paragraph in that behalf are incorporated in this count by reference as fully as if they were herein repeated, and then and there well knowing all the premises in said paragraph set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor against all other such coal dealers there and all shippers of coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

43 The P. Koenig Coal Company aforesaid, on said August 2, 1922, then as aforesaid, well knowing all the premises aforesaid, and intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal, and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation, in interstate commerce, of the coal in this count mentioned, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, by and through the device of sending, on the day in said fifth count aforesaid, from Detroit aforesaid to said The Monitor Coal and Coke Company, the telegraphic order in said fifth count mentioned, induced the placing, furnishing and assigning, by said The Chesapeake and Ohio Railway Company, on August 16, 1922, at the request of said The Monitor Coal and Coke Company, of a certain other car, suitable for the loading and transportation of coal, at said coal-loading point on its said lines in West Virginia, to wit, the car bearing the initials "C. & O." and the serial number "13105," at said Monitor No. 2 mine of said The Monitor Coal and Coke Company at Logan aforesaid, the loading of said last-mentioned car, on said August 16, 1922, by said The Monitor Coal and Coke Company, with 103,500 pounds of run-of-mine bituminous

coal, the tendering, by said The Monitor Coal and Coke Company, to said The Chesapeake and Ohio Railway Company, for
44 transportation, of said loaded car, billed and consigned in accordance with said telegraphic order, the transportation thereof by said common carriers, from Logan aforesaid, by continuous carriage and shipment, over their connecting railway lines, to Detroit aforesaid, in accordance with said billing, and its delivery there, on said August 31, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; that said coal thereupon was so used by said last-mentioned concern; and that at the several times of the sending by said The P. Koenig Coal Company of said telegraphic order, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern,
45 the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company, so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use or for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which by force of said Service Order No. 23 and of said amendment thereto, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others;

against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

47 The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17,

1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "N. Y. C." and the serial number "314045", at Argyle Mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 85,300 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said City of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it

the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "62739," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 104,300 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corpo-

ration, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested

54 said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

55

ELEVENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 6, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, The Detroit and Toledo Shore Line Railroad Company, and The Grand Trunk

Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

- 56 The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and
- 57 transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "58292," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Argyle Coal Company with 98,600 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions which were given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 6, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said City; which

said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

58 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit, aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carloads of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

59 3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

TWELFTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this

indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

61 The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "62977," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the
62 loading of said car on August 17, 1922, by said Lundale Coal Company with 109,500 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of

said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Iron-ton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid to said City of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for
63 securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said
64 carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The

P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

THIRTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Iron-
ton Railroad Company, said Wabash Railway Company, and
65 said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in cars of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and

thereby induced, (1) the placing, furnishing and assigning by
66 said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "54948," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Lundale Coal Company with 101,600 pounds of bituminous run-or-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid, to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said
67 device then and there was a deceptive device because none of said carriers then had any knowledge of *of* said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive
68 a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

FOURTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 1, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain
69 other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the place-

ment of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into

70 said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Thurmond Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. C. C. & St. L." and the serial number "81349," at Dabney mine, at Dabney, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Thurmond Coal Company with 110,900 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Thurmond Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Dabney aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said

71 The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Dabney to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 1, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automo

biles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

73

FIFTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 1, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the first count of this indictment, which allegations of said first count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Detroit and Toledo Shore Line Railroad Company, and the Grand Trunk Railway Company

of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 16, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 19 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 19 carloads of coal for transportation billed and consigned to St. Mary's Hospital at Detroit aforesaid, in care of and to be delivered to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 17, 1922, at the request of said Amherst Fuel Company and the Thurmond Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. C. C. & St. L." and the serial number "73494," at Dabney mine, at Dabney, in West Virginia aforesaid, (2) the loading of said car on August 17, 1922, by said Thurmond Coal Company with 102,900 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Thurmond Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 16, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Dabney aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Detroit and Toledo Shore Line Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Dabney to said city of Detroit, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 1, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there ac-

cepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several

76 times of the said purchasing of said coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said St. Mary's Hospital, as said The P. Koenig Coal Company at all those times well knew, did not need or require said carload of coal and had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatever, for its own use, for the use of said Dodge Brothers, or of any other consumer.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then. as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the Interstate Commerce Commission of the United States, on July 25, 1922, was of opinion that an emergency requiring immediate action then existed upon the lines of each and all common carriers by railroad subject to the act to regulate com-

merce and the acts amendatory thereof and supplementary thereto in that section of the United States lying east of the Mississippi River, and thereupon, under the authority of said act to regulate commerce and of said acts amendatory thereof and supplementary thereto, by its Service Order No. 23 of that date and on that day duly promulgated, suspended, in that section, from and after July 26, 1922, until the further order of said Interstate Commerce Commission, all of the rules, regulations and practices with respect to car service of common carriers by railroad subject to the provisions of said acts which conflicted with the directions in that order made; that, in and by said Service Order No. 23 it was provided that, each of such common carriers, to the extent that it was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its line or lines of railway, should give preference and priority to the movement of certain commodities, among which was coal, and that, in supplying cars to mines upon the lines of each such carrier as was a coal-loading carrier, that is

78 to say, a carrier serving coal mines located upon its own lines, such carrier should place at, furnish with, and assign to, such coal mines cars suitable for the loading and transportation of coal in succession, as might be required for certain classes of purposes, and in the order of classes indicated by their numbers, class 1 being for such purposes as might from time to time be specifically designated by said Interstate Commerce Commission or its agents, and should give preference and priority in such placement and assignment of cars for the loading of coal required for the current use of ice plants which supplied refrigeration for human foodstuffs and of manufacturers and producers of foodstuffs, which were placed in class 2, over such placement and assignment of cars for the loading of coal required for the manufacturing of automobiles or automobile parts, which were then placed in class 5, but, afterwards, to wit, by amendment No. 4 to said Service Order No. 23, dated August 29, 1922, and effective August 30, 1922, in class 3; and, further, that coal shipped and consigned for the current use of such ice plants and manufacturers and producers of foodstuffs should not be re-consigned or diverted for such automobile manufacturing purposes; that during the period of time extending from the day of such promulgating of said Service Order No. 23 to September 20, 1922, said Service Order No. 23 and its said amendment remained in full force and effect; and that there was in fact during all of said period of time such a shortage of equipment, particularly in serviceable locomotives and cars suitable for the transportation of coal, and such a congestion of traffic, upon the lines of a certain coal-loading railroad common carrier in said section of the

79 United States, to wit, of The Chesapeake and Ohio Railway Company, resulting from strikes and non-action of employees of said common carrier whose duty it was to keep such equipment in repair and in a serviceable condition, as that said common carrier

was currently unable promptly to transport all freight traffic offered to it for movement, or to be moved over its lines of railway, and although said carrier then was able to place at, furnish with, and assign to, coal mines upon its lines cars suitable for the loading and transportation of a portion of the coal required for the uses in this count aforesaid, and for the current use of other consumers of coal in the same class with such ice plants and manufacturers and producers of foodstuffs, to wit, class 2, under said Service Order No. 23, to wit, seventy-eight per cent thereof, it then was unable to place at, furnish with, or assign to, coal mines upon its lines any suitable cars whatsoever for the loading and transportation of coal required for manufacturing automobiles or automobile parts, or any suitable cars whatsoever for class 3 or class 5 purposes, or for any purposes but class 1 and class 2 purposes.

2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, during said period of time, to wit, on August 30, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions in this count of this indictment above set forth, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, the Detroit, Toledo and Ironton Railroad Company, the Wabash Railway Company, and the Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

The P. Koenig Coal Company aforesaid, on August 5, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 40 car loads, of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 40 carloads of coal for transporta-

tion billed and consigned to the Detroit Creamery, at Detroit aforesaid (it then being an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing, and assigning by said The Chesapeake and Ohio Railway Company, on August 5, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "63900," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on August 5, 1922, by said Lundale Coal Company with 114 600 pounds of bituminous run-of-mine coal, that being a carload. (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 5, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway
82 Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid, in West Virginia aforesaid, to said city of Detroit, in said Southern Division of said Eastern District of Michigan, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said August 30, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

3. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its
83 said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said con-

cern, the said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Dodge Brothers.

4. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on September 2, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the sixteenth count of this indictment, which allegations of said sixteenth count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that it to say:

The P. Koenig Coal Company aforesaid, on August 7, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 50 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobiles and automobile parts, knowingly instructed said Amherst Fuel Company to tender said 50 carloads of coal for transportation billed and consigned to said Detroit Creamery, at Detroit aforesaid (it then and there being, as aforesaid, an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway Company, on August 7, 1922, at the request of said Amherst Fuel Company and the Lundale Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the name "Erie" and the serial number "31280," at Lundale mine, at Lundale, in West Virginia aforesaid, (2) the loading of said car on said August 7, 1922, by said Lundale Coal Company with 104,500 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Lundale Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 7, 1922, by said The P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Lundale aforesaid, by said The Chesapeake and Ohio Railway Company, said Detroit, Toledo and Ironton Railroad Company, said Wabash Railway Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Lundale aforesaid in West Virginia aforesaid, to said city of Detroit, in said division and district, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said September 2, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding near Scott Street, in said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

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87 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, at Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobiles and automobile parts, to wit, to Dodge Brothers, a corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, the said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had not authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Dodge Brothers.

88 3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

89

EIGHTEENTH COUNT

1. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, on August 28, 1922, at Detroit aforesaid, in said Southern Division of said Eastern District of Michigan, under the circumstances and conditions alleged in paragraph numbered 1 of the sixteenth count of this indictment, which allegations of said sixteenth count in that behalf are incorporated in this count by reference as fully as if they were here repeated, unlawfully did knowingly accept and receive a certain other concession in respect to the transportation of

certain other property in interstate commerce by certain common carriers by railroad in said section of the United States lying east of the Mississippi River, subject to said act to regulate commerce and the acts amendatory thereof and supplementary thereto, to wit, from said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Michigan Central Railroad Company, and said Grand Trunk Railway Company of Canada, whereby an advantage was given to said The P. Koenig Coal Company and a discrimination was practiced in its favor and against all other such coal dealers there, and all shippers desirous of shipping coal embraced in classes 3 and 5 of said Service Order No. 23 from mines located upon the lines of and served by said The Chesapeake and Ohio Railway Company; that is to say:

90 The P. Koenig Coal Company aforesaid, on August 12, 1922, then as aforesaid well knowing all the premises aforesaid, purchased a large quantity, to wit, 80 carloads of coal from the Amherst Fuel Company, having an office at Cincinnati, in the State of Ohio, and, intending by a device to obtain preference and priority in the placement of cars for the loading and transportation of coal, which it, the said The P. Koenig Coal Company was not then lawfully entitled to receive, and intending to procure for the concern in this count hereafter named the transportation of the coal in this count hereafter mentioned, in interstate commerce, from West Virginia into said Southern Division of said Eastern District of Michigan, for the use of that concern in the manufacture of automobile bodies, knowingly instructed said Amherst Fuel Company to tender said 80 carloads of coal for transportation billed and consigned to the Towards Creamery, at Detroit aforesaid (it then and there being an ice plant which supplied refrigeration for human food stuffs and a manufacturer and producer of food stuffs and a branch of said Detroit Creamery), in care of said The P. Koenig Coal Company, for delivery there to said The P. Koenig Coal Company upon its side track connecting with the railway line of said Grand Trunk Railway Company of Canada, and thereby induced, (1) the placing, furnishing and assigning by said The Chesapeake and Ohio Railway

Company, on August 12, 1922, at the request of said Amherst
91 Fuel Company and the Argyle Coal Company, of a certain car suitable for the loading and transportation of coal at a certain coal-loading point on its railway lines in West Virginia, to wit, the railway car bearing the initials "C. & O." and the serial number "19447," at Argyle mine No. 1, at Yolyn, in West Virginia aforesaid, (2) the loading of said car on said August 12, 1922, by said Argyle Coal Company with 82,600 pounds of bituminous run-of-mine coal, that being a carload, (3) the tendering by said Argyle Coal Company to said The Chesapeake and Ohio Railway Company of said loaded car for transportation, billed and consigned in accordance with said instructions given on August 12, 1922, by said The

P. Koenig Coal Company as aforesaid, (4) the transportation thereof from Yolyn aforesaid, by said The Chesapeake and Ohio Railway Company, said The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, said The Michigan Central Railroad Company, and said Grand Trunk Railway Company of Canada, by continuous carriage over their respective connecting railway lines, from said mine at Yolyn aforesaid, in West Virginia aforesaid, to said city of Detroit, in said division and district, in accordance with said instructions and billing, and (5) the delivery of said carload of coal in said car, on said August 28, 1922, to said The P. Koenig Coal Company upon its said Grand Trunk siding at Seven Mile Road near said city; which said delivery said The P. Koenig Coal Company then and there accepted; and which said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company.

92 2. And the grand jurors aforesaid, upon their oath aforesaid, do further present, that said The P. Koenig Coal Company, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said last-mentioned coal as aforesaid, near Detroit aforesaid, in said division and district, there diverted and delivered the same in said car to a concern engaged in the manufacture, at Detroit aforesaid, of automobile bodies, to wit, to the Fisher Body Corporation, for its use in such manufacture; and that at the several times of the said purchasing of said carload of coal and the giving of said billing instructions, of said procuring of said transportation of said last-mentioned carload of coal, of its said delivery to and acceptance by said The P. Koenig Coal Company, and of its said diversion and delivery to said concern, neither the said Towards Creamery nor said Detroit Creamery, as said The P. Koenig Coal Company at all those times well knew, had authorized or requested said The P. Koenig Coal Company so to use its name for the purpose of procuring said last-mentioned carload of coal, or any coal whatsoever, for the use of any other consumer of coal or for the use of said Fisher Body Corporation.

3. And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said The P. Koenig Coal Company, at the time and place, in manner and form, and by the device and means, in this count aforesaid, unlawfully did knowingly accept and receive a concession in respect to the transportation of property in interstate commerce by common carriers subject to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, obtained by deception practiced by it upon said carriers, whereby an advantage was given, by those carriers, to said The P. Koenig Coal Company, which, by force of said Service Order No. 23, was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it the said The

P. Koenig Coal Company, and which the said common carriers, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EARL J. DAVIS,
United States Attorney.

JOHN A. BAXTER,
*Assistant United States Attorney,
Eastern District of Michigan.*

A true bill.

CONRAD J. NETTING,
Foreman of Grand Jury.

[File indorsement omitted.]

94

In United States District Court

[Title omitted.]

Demurrer

Filed Feb. 25, 1924

Now comes the P. Koenig Coal Company, by Edwin R. Monnig and Harold Goodman, its attorneys, and having heard the said indictment read, says that the indictment in each and every count thereof, and the matters therein contained in manner and form, and as the same are above stated and set forth in respect to each and every count thereof, are not sufficient in law in the following respects:

1. The acts charged do not constitute the receipt on the part of the defendant of a concession given or a discrimination practiced by common carriers and such acts as charged are not defined by the laws of the United States as crimes.

2. The defendant was entitled at the times therein alleged to receive transportation without regard to the restrictions imposed by paragraph 7 of the Interstate Commerce Commission's Service Order No. 23, because paragraph 7 was beyond the power of the Interstate Commerce Commission to make in the following respects:

(a) It is the attempted exercise of purely legislative powers conferred upon the Congress of the United States by article 1, sections 1 and 8 of the Constitution of the United States, and the said powers could not be delegated to the Interstate Commerce Commission.

(b) Paragraph 7 of Service Order No. 23 exceeds the authority conferred upon the Interstate Commerce Commission.

(c) The Federal Government is without constitutional power to affect the use, consumption, price, and disposition of coal and to exercise a local police power as attempted in said service order, because such powers are reserved to the several States.

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(d) The order is so arbitrary and unreasonable that in the manner and form as made it is not within the powers of the National Government and of the Interstate Commerce Commission, and is an encroachment of the powers of the several States.

(e) The said service order violated the fifth amendment of the Constitution of the United States in that it deprives this defendant of liberty and of property without due process of law because it arbitrarily closes railway transportation for the use of this defendant thereby depriving him of his trade custom and profits, and it grants the privilege of transportation unto other and favored persons.

(f) It is invalid as in violation of section 9, article 1 of the Constitution of the United States in that it gives preference to the Lake Erie ports of Ohio and Pennsylvania over the ports of other States, in respect to the transportation and shipment of coal, and that it gives a preference to the Lake Superior ports of Michigan, Wisconsin, and Minnesota over the ports of other States with respect to the receipt of shipments of coal.

And that the said P. Koenig Coal Company is not bound by the law of the land to answer the same, and this it is ready to verify:

Wherefore, for want of sufficient indictment in this behalf, the said P. Koenig Coal Company prays judgment and that by the court it may be dismissed and discharged from the said premises in the said indictment specified.

EDWIN R. MONNIG,
HAROLD GOODMAN,
Attorneys for Defendant.

[File indorsement omitted.]

96

In United States District Court

[Title omitted.]

Hon. Delos G. Smith, of Detroit, United States attorney, and William H. Bonneville, Esq., of Washington, special assistant United States attorney, attorneys for plaintiff; Edwin R. Monnig, Esq., and Harold Goodman, Esq., both of Detroit, attorneys for defendant.

Opinion

Filed Sept. 22, 1924

TUTTLE, District Judge:

This cause is now before the court, on demurrer to an indictment, for the second time. On the previous hearing a demurrer to the indictment then pending was sustained for reasons pointed out in the written opinion of the court, as reported in 291 Federal 385. Thereafter, another indictment was returned against the defendant based upon the same transactions as were involved in the previous indictment, but framed in an effect to avoid the objections sustained

on the former hearing. A demurrer has again been filed, challenging the sufficiency of the present indictment on grounds not previously presented nor passed upon.

The indictment charges the defendant with having knowingly accepted certain illegal concessions in respect to the transportation of property in interstate commerce, in violation of section 1 of the so-called Elkins Act (act Feb. 19, 1903, c. 708, 32 Statutes at Large, 847) as amended by section 2 of the Hepburn Act (act June 29, 1906, c. 3591, 34 Statutes at Large, 587 — Comp. St. section 8597). The language of this section, as so amended, which is here involved is as follows:

97 "It shall be unlawful for any person * * * or corporation to * * * accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier * * * whereby any * * * advantage is given or discrimination is practiced. Every person or corporation * * * who shall knowingly * * * accept or receive any such rebate, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished" as provided in said section.

The concessions charged to have been accepted by the defendant are alleged to have resulted from the obtaining by it, from a certain common carrier, by means of deception, of a preference and priority forbidden by a certain order made by the Interstate Commerce Commission on July 25, 1922, known as Service Order No. 23. The material provisions of that order were as follows:

"It is ordered and directed: * * * That * * * common carriers by railroad are hereby authorized and directed whenever unable to supply all uses in full to furnish * * * coal mines with open top cars suitable for the loading and transportation of coal, in preference to any other use, supply, movement, distribution, exchange, interchange or return of such cars. * * *

"That in the supply of cars to mines * * * such carrier is hereby authorized and directed to place, furnish, and assign such coal mines with cars suitable for the loading and transportation of coal in succession as may be required for the following classes of purposes, and in following order of classes, namely:

"Class 1. For such special purposes as may from time to time be specially designated by the Commission or its agent therefor. And subject thereto:

"Class 2: * * * For * * * hospitals * * * all to the end that such * * * quasi public utilities * * * may be kept supplied with coal for current use for such purposes, but not for storage, exchange, or sale. And subject thereto: * * *

"Class 5. Other purposes. No coal embraced in classes 1, 2, * * * shall be subject to reconsignment or diversion except for some purpose in the same class or a superior class in the order of priority herein prescribed."

None of such preferred classes included manufacturers of automobiles.

The indictment contains eighteen counts, of which the first is typical of all. That count first alleges the making, by the Interstate Commerce Commission, of the service order in question, recites the terms of such order, and alleges the inability of common carriers to transport all freight traffic offered, and to place, furnish, and assign to coal mines cars for the transportation of coal required for manufacturing automobiles or automobile parts, although able to assign such cars for coal required for the current use of hospitals. It is then alleged that while said order was in effect and applicable, the defendant, a corporation engaged in the business of a coal dealer, knowingly accepted a concession of the kind forbidden by the statute just cited, by means of the following transaction: That the defendant, intending by that means to obtain a preference and priority in the placement and assignment of cars for the loading of coal and in the transportation of coal, which it was not then lawfully entitled to receive, and intending to procure for Dodge Brothers, a corporation engaged in the manufacture of automobiles at Detroit, in this district, the transportation of certain coal in interstate commerce from West Virginia into said district for the use of said Dodge Brothers in the manufacture of automobiles and to divert and deliver such coal to such manufacturer, through the device of sending to a certain named coal mining company in West Virginia a telegraphic order for certain coal purporting to be an order for the shipment of such coal to a certain named hospital at the city of Detroit in care of the defendant and to be delivered there to defendant on its side tracks, for the use of such hospital, induced the placing and assigning by a named common carrier railroad company, at the request of said mining company, of a described car at a particular mine in West Virginia and the loading and tendering of said car, by said mining company, to said railroad company for transportation, billed and consigned in accordance with said telegraphic order, by said carrier and its connecting carriers, to Detroit and its delivery there to the defendant on its said siding, which delivery the defendant accepted. It is then charged that "said device then and there was a deceptive device because none of said carriers then had any knowledge of said intentions of said The P. Koenig Coal Company"; that the defendant, in pursuance of its said intentions and as a final step in a device for securing said unlawful concession, immediately upon the receipt and acceptance by it of said coal there directed and delivered the same in said car to said Dodge Brothers for use in its manufacture of automobiles, which coal was so used by it; that during all of the aforesaid acts on the part of the defendant, the said hospital, as defendant well knew, did not need said coal and had not authorized or requested the defendant to use its name for the purpose of procuring coal for its own use or for the use of any other consumer; and that, therefore,

the defendant, by the device referred to, knowingly accepted and received a concession in respect to the transportation of property in interstate commerce by a common carrier subject to the interstate commerce act, which concession was "obtained by deception practiced by it upon said carrier, whereby an advantage was given by those carriers to said The P. Koenig Coal Company, which by force of said Service Order No. 23 was not then, as said The P. Koenig Coal Company then and there well knew, open or due to it, the said The P. Koenig Coal Company, and which the said common carrier, but for said device and deception, would not have granted to it, and whereby a discrimination was practiced in its favor and against others, against the peace and dignity of the United States and contrary to the form of the statute of the same in such case made and provided."

The first ground on which the demurrer of the defendant is based is that the acts so charged in the indictment do not constitute the acceptance or receipt by the defendant of a "concession" given by a common carrier, as forbidden by the statute thus relied on by the Government.

After close and careful consideration of the able and exhaustive briefs submitted by the parties, I have reached the conclusion that the contention of the defendant in this respect is correct and that for that reason alone the demurrer must be sustained.

It cannot be doubted that the conduct of which the defendant is here accused was, if indulged in, most reprehensible and deserving of severe condemnation. The sole question, however, with which this court is now concerned is whether such conduct constitutes the acceptance or receipt of a "concession" from a common carrier railroad, as denounced by the statute invoked by the Government.

It is an elementary rule of statutory construction that, in the absence of circumstances indicating otherwise, words, used by a legislative tribunal in the enactment of a statute are to be considered as having been so used according to their usual, ordinary meaning.

100 The common dictionary meaning of a "concession" (as illustrated by the definition in the Century and in Webster's International dictionaries) is "The act of conceding or yielding, usually implying a demand, claim, or a request," "a thing yielded," "a grant."

Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, but solely through and by means of deception practised upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done "but for said device and deception." To say, under these alleged circumstances, that the carriers

thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion, to do violence to the plain meaning of language and to fail to call things by their proper names. If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from his victim (and, therefore, necessarily granted or given, even although unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession "given" him, though not knowingly. I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in *United States vs. Metropolitan Lumber Co.*, 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I cannot avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I cannot agree.

101 A careful reading of the Elkins Act leaves no doubt that its purpose was to punish and prevent the favoritism of shippers by common carriers in interstate commerce, and that, in order to more effectually accomplish this purpose Congress, after originally legislating against only the carriers, who granted such favoritism, extended its prohibitions so as to reach also the recipients of, and participants in, such favoritism, namely, the shippers who, by knowingly accepting or receiving such unfair favors, promoted and made them possible. In the language of the report of the Committee on Interstate Commerce in reporting the bill to the House (which report, of course, is entitled to consideration in the judicial construction of the statute), the committee believed that the Elkins Act, together with the interstate commerce law then existing, covered about all possible means "to prevent the granting of discriminations in favor of one shipper against another, or the building up of the one concern through the favoritism of railroad corporations."

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (section 10 of the act of Feb. 4, 1887, ch. 104, 24 Stat. 382, as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and

limited to the plain meaning of the language used, I reach the conclusion that it cannot properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

ARTHUR J. TUTTLE,
District Judge.

DETROIT, MICH., *September 22, 1924.*

[File indorsement omitted.]

102

In United States District Court

Order sustaining demurrer

Sept. 22, 1924

[Title omitted.]

In this cause demurrer to the indictment herein having been heretofore duly argued and submitted, and the court having taken time for mature deliberation thereon, does now here order that said demurrer be, and the same is, hereby sustained, in accordance with the terms of the written opinion this day filed herein.

103

In United States District Court

[Title omitted.]

Assignment of errors

Filed Oct. 18, 1924

United States of America, plaintiff, by its counsel, now comes and, in connection with its petition for writ of error, files the following assignment of errors on which it will rely on its writ of error to the Supreme Court of the United States from the final judgment of the District Court entered September 22, 1924.

The District Court erred:

1. In sustaining the demurrer.
2. In not overruling the demurrer.
3. In not sustaining the indictment.
4. In holding and adjudging that the acts alleged in the indictment do not constitute the offense charged.

5. In holding and adjudging that the acts alleged in the indictment on which the defendant is charged with having knowingly accepted or received certain illegal concessions or discriminations in respect to the transportation of property in interstate commerce did not constitute a violation of section 1 of the Elkins Act (C. 708 32 Stat. 847) as amended by section 2 of the Hepburn Act (C. 3591, 34 Stat. 587).

6. In not holding and adjudging that the acts alleged in the indictment constitute on the part of the defendant the acceptance or receipt by the defendant of certain illegal concessions or discriminations within the meaning of section 1 of the Elkins Act (C 708, 32 Stat. 847) as amended by section 2 of the Hepburn Act (C 3591, 34 Stat. 587).

104 7. In deciding and holding as follows:

Now, nothing could be clearer than that, under the express allegations of the indictment involved, the advantage obtained is explicitly declared to have been received by the defendant from the carriers, not as a benefit yielded or consciously granted by them, solely through and by means of deception practiced upon them by the defendant. The Government charges in substance that the carriers were tricked by the defendant into transporting this coal, which they would not have done "but for said device and deception." To say under these alleged circumstances, that the carriers thus imposed on by the defendant and fraudulently induced to transport this freight were thereby actually granting (although unknowingly) to the defendant a "concession" or that the defendant was thereby receiving from such carriers a "concession," is, in my opinion to do violence to the plain meaning of language and to fail to call things by their proper names.

8. In deciding and holding as follows:

If an advantage obtained by such artifice and fraud be a concession accepted or received by the deceiver from its victim (and, therefore, necessarily granted or given, even though unknowingly, by the deceived), then the hobo who steals a ride on the "bumpers" of a railroad car thereby receives and accepts a concession given him by such railroad, and the thief who picks the pocket of a conductor on a train knowingly accepts and receives a concession "given" him, though not knowingly, I can perceive no real difference nor distinction in the underlying principles involved in the instances just suggested. In essence they seem to me to be the same. Although I am aware that in the only reported decision, so far as I can learn, involving this precise question (that of the district judge in *United States v. Metropolitan Lumber Co.*, 254 Fed. 335), a contrary opinion was reached, I am unable, after careful study of that decision, to approve or accept the conclusions there expressed. I cannot avoid the conviction that they embody, and are based upon, the reasoning to which I have already referred and with which I cannot agree.

9. In deciding and holding as follows:

Nor is it without significance, as bearing upon the meaning of this statute, that an entirely different statute (Section 10 of the Act of Feb. 4, 1887, ch. 104, 24 Stat. 382, as amended) expressly forbids the obtaining of various kinds of rebates by means of false statements, "whether with or without the consent or connivance of the carrier," being apparently intended by Congress to relate to an evil not also covered by any other statutory provision.

10. In deciding and holding as follows:

In view of the considerations mentioned, and bearing in mind that the penal statute involved should be construed strictly and limited to the plain meaning of the language used, I reach the conclusion that it cannot properly be so extended as to include within its prohibitions the conduct charged against the defendant by the indictment at bar.

105 11. In deciding and holding as follows:

For the reasons stated, the demurrer must be sustained on the first ground therein presented, namely, that the acts alleged in the indictment do not constitute the offense charged. There is, therefore, no occasion to consider the objections urged to the validity of the service order involved. An order will be entered sustaining the demurrer.

12. In entering the order sustaining the demurrer.

Wherefore, United States of America prays that the final judgment of the District Court entered September 22, 1924, sustaining the demurrer be reversed, annulled, and set aside, and for such other and further order as may be appropriate.

DELOS G. SMITH,

United States Attorney.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

[File indorsement omitted.]

106

In United States District Court

[Title omitted.]

Petition for writ of error

Filed Oct. 18, 1924

United States of America, plaintiff, by its counsel, now comes and says that on or about September 22, 1924, this court filed its opinion and entered its judgment in favor of the defendant against the plaintiff, in which judgment and proceedings had prior thereto in said cause certain errors were committed to the prejudice of the plaintiff, all of which will more fully appear from the assignment of errors on file.

Wherefore, United States of America prays that a writ of error may issue in its behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a tran-

script of the record, proceedings, and papers in said cause, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States, in accordance with the provisions of the act of Congress approved March 2, 1907 (34 Stat. 1246).

DELOS G. SMITH,

United States Attorney.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

Approved:

CHARLES C. SIMONS,

United States District Judge.

[File indorsement omitted.]

107

In United States District Court

[Title omitted.]

Order allowing writ of error

Filed Oct. 18, 1924

United States of America, plaintiff, having by its counsel made and filed its petition praying a writ of error to the Supreme Court of the United States from the final judgment of the District Court entered September 22, 1924, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and adjudged that the writ of error be and the same is hereby allowed as prayed and made returnable within thirty (30) days from the date hereof and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said final judgment was made and entered to the Supreme Court of the United States.

CHARLES C. SIMONS,

United States District Judge.

[File indorsement omitted.]

108

In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed Nov. 17, 1924

To the Clerk of the District Court:

Please transmit as the transcript of record in the above entitled cause, the following pleadings, documents and records to the Supreme Court of the United States:

1. Indictment.
2. Demurrer.

3. Opinion of the court.
4. Order on opinion sustaining demurrer.
5. Assignments of error.
6. Petition for writ of error.
7. Order allowing writ of error.

DELOS G. SMITH,
United States Attorney.

I hereby acknowledge service upon me of the above præcipe.

HAROLD GOODMAN,
Attorney for Appellee.

Dated this 16th day of November, 1924.

[File indorsement omitted.]

109

In United States District Court

[Title omitted.]

Writ of error

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the Judge of the District Court of the United States for the Eastern District of Michigan, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court before you, between United States of America, plaintiff, and The P. Koenig Coal Company, a corporation, defendant, a manifest error hath happened, to the great damage of the said United States, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, the 18th day of October, in the year of our Lord one thousand nine hundred and twenty-four.

[SEAL.]

ELMER W. VOORHEIS,

Clerk of the District Court of the United States.

111

[Citation in usual form showing service on Ed. R. Monnic and Harold Goodman. Omitted in printing.]

In United States District Court

[Title omitted.]

Clerk's certificate

EASTERN DISTRICT OF MICHIGAN,

Southern Division, ss:

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to writ of error, sued out by the United States of America in the above entitled cause; that it is a true copy of the records and proceedings designated to be included in my said return, as the same appears of record and on file in my office; that I have compared the foregoing record with the originals, and that it is a true and correct transcript therefrom, and of the whole of such designated records and proceedings in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this twenty sixth day of November, in the year of our Lord, one thousand nine hundred and twenty four, and of the Independence of the United States of America, the one hundred and forty ninth.

[SEAL.]

ELMER W. VOORHEIS,
*Clerk, United States District Court,
Eastern District of Michigan.*

(Indorsed on cover:) File No. 30,721. E. Michigan D. C. U. S. Term No. 756. The United States of America, plaintiff in error, vs. The P. Koenig Coal Company. Filed December 3rd, 1924. File No. 30,721.

